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CLERK US DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BY  DEPUTY

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

CHRISTOPHER DALE SMITH,  
Petitioner,

v.

LARRY SMALL, Warden, et al.,  
Respondents.

Civil No. 09cv2208-BEN (NLS)

**ORDER:**

**(1) GRANTING MOTION TO  
APPEAR PRO BONO;**

**(2) DENYING MOTION FOR  
STAY AND ABEYANCE; AND**

**(3) DISMISSING ACTION  
WITHOUT PREJUDICE**

On October 6, 2009, Petitioner, a state prisoner proceeding pro se, filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, and paid the \$5.00 filing fee. (Doc. No. 1.) On October 16, 2009, the Court dismissed the Petition because Petitioner indicated that he had not exhausted his state court remedies with respect to any claim presented in the Petition. (Doc. No. 2.) Petitioner was instructed that if he wished to proceed with this action he was required to file a First Amended Petition on or before December 15, 2009, in which he cured that pleading defect. (*Id.*)

On October 13, 2010, nearly a year later, Petitioner filed three documents: (1) an amended petition which has been docketed as a Motion to Amend the Petition; (2) a Notice of Appearance as Pro Bono Counsel which has been docketed as a Motion for leave of counsel to appear pro

1 bono; and (3) a Motion for Stay and Abeyance. (Doc. Nos. 7-9.) The amended petition indicates  
 2 that Petitioner is currently in the process of exhausting his state court remedies with respect to  
 3 the claims presented, having secured denials of his claims in the trial court on November 23,  
 4 2009, and the appellate court on January 11, 2010. (Amended Pet. at 3-4.) Petitioner indicates  
 5 that his claims are currently pending in the California Supreme Court. (*Id.* at 4.) Petitioner  
 6 admits that he has not completed exhaustion of his state court remedies, but requests the Court  
 7 to stay this action and hold his amended petition in abeyance until the California Supreme Court  
 8 rules on his claims. (Pet.'s Mot. for Stay at 2-3.)

9 The Motion for Counsel to appear pro bono is **GRANTED** pursuant to Southern District  
 10 of California Local Civil Rule 83.3g. The Motion for Stay and Abeyance is **DENIED** because  
 11 the Court does not have discretion to stay a habeas petition which contains only unexhausted  
 12 claims; the Court must dismiss such petitions. *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir.  
 13 2006) ("Once a district court determines that a habeas petition contains only unexhausted claims,  
 14 . . . it may simply dismiss the petition for failure to exhaust), citing *Jiminez v. Rice*, 276 F.3d  
 15 478, 481 (9th Cir. 2001) (holding that court must dismiss petition containing no exhausted  
 16 claims); *see also Rhines v. Weber*, 544 U.S. 269, 274-77 (2005) (approving of the stay and  
 17 abeyance procedure for mixed petitions but repeatedly emphasizing that there remains a "total  
 18 exhaustion requirement" for federal habeas claims). Petitioner has admitted that his claims are  
 19 not exhausted, and it appears that he did not begin the process of exhausting his claims until after  
 20 this action was dismissed over a year ago.

21 Accordingly, this action is **DISMISSED** without prejudice for the same reasons set forth  
 22 in the Court's October 16, 2009 Order, namely, that Petitioner has failed to exhaust state court  
 23 remedies with respect to any claim presented. The dismissal is without prejudice to Petitioner  
 24 to present his claims in a new federal habeas petition, which will be assigned a new civil case  
 25 number, after he has exhausted his state court remedies.

26 **IT IS SO ORDERED.**

27 DATED: 10/25/2010

28   
 Roger T. Benitez  
 United States District Judge